

7. The U.S. Nuclear Regulatory Commission: Rules for Commission Appointments (Part I)

Gail H. Marcus, Consultant, USA



Profile (January 2008)

Dr. Gail H. Marcus is presently an independent consultant on nuclear power technology and policy. She recently completed a three-year term as Deputy Director-General of the OECD Nuclear Energy Agency (NEA) in Paris. In this position, she was responsible for the program of work and budget for the agency. From 1999 through 2004, Dr. Marcus served as Principal Deputy Director of the Office of Nuclear Energy, Science and Technology. There she provided technical leadership for DOE's nuclear energy programs and facilities, including the development of next-generation nuclear power systems. Other responsibilities included production and distribution of isotopes for medical treatment, diagnosis and research, and oversight of DOE test and research reactors and related facilities and activities. From 1998-1999, Dr. Marcus spent a year in Japan as Visiting Professor in the Research Laboratory for Nuclear Reactors, Tokyo Institute of Technology. She conducted research on comparative nuclear regulatory policy in Japan and the United States.

Previously, Dr. Marcus had been in the US Nuclear Regulatory Commission (NRC). She served in a variety of positions including Deputy Executive Director of the Advisory Committee on Reactor Safeguards/Advisory Committee on Nuclear Waste; Director of Project Directorate III-3, providing regulatory oversight of seven nuclear power plants in the Midwest; and Director of the Advanced Reactors Project Directorate, where she was responsible for technical reviews of advanced reactor designs.

She also served as technical assistant to Commissioner Kenneth Rogers at the NRC for over four years, providing advice and recommendations on a broad range of technical and policy issues of interest to the Commission. From this position she was detailed for five months to Japan's Ministry of International Trade and Industry, where she was NRC's first assignee to Japan, studying Japan's licensing of the Advanced Boiling Water Reactor.

Prior to her service at NRC, Dr. Marcus was Assistant Chief of the Science Policy Research Division at the Congressional Research Service (1980-1985). In this position, she was responsible for policy analysis in support of Congress covering all fields of science and technology, and played a lead role in policy analysis and development for energy, nuclear power, and risk assessment and management.

Organization:

From 2001-2002, Dr. Marcus served as President of the American Nuclear Society (ANS), an 11,000 member professional society. She is a Fellow of the ANS and of the American Association for the Advancement of Science (AAAS). She is a former member of the National Research Council Committee on the Future Needs of Nuclear Engineering Education, and served three terms on the MIT Corporation Visiting Committee for the Nuclear Engineering Department. She is just completing a term as the elected Chair of the Engineering Section of AAAS.

Publication:

Dr. Marcus has authored numerous technical papers and publications. Her research interests include nuclear regulatory policy, energy technology and policy, risk assessment and management, international nuclear policy, and advanced nuclear technologies.

Education:

Dr. Marcus has an S.B. and S.M. in Physics, and an Sc.D. in Nuclear Engineering from MIT. She is the first woman to earn a doctorate in nuclear engineering in the United States.

First, I want to say that I am glad to be back again writing for the Marcus Room. I thank JANUS for this new opportunity and look forward to a continued dialogue.

During the hiatus since my last set of essays, we have had some changes to the US Nuclear Regulatory Commission. The Chairman appointed under the Republican Administration, Dale Klein, was replaced as chairman by Gregory Jaczko, appointed by the new Democratic Administration. Following that, Dale Klein stayed at the NRC as a Commissioner, but announced his intention to leave as soon as a replacement was appointed. Since there were already two vacancies on the Commission, this created a total of three positions to be filled. This spring, they were filled by Commissioners George Apostolakis, William Magwood, and William Ostendorff. The new Commission can be seen at

<http://www.nrc.gov/about-nrc/organization/commfucdesc.html>

During this whole process, I was questioned a number of times by colleagues outside the US government about parts of the process. It became clear to me that there are a lot of misperceptions about the rules of the game. I can certainly see why! The rules are a bit arcane, and the practices have, in some cases, created the impression that there are additional rules—but they are, in fact, just practices, and not requirements.

Although the positions are now filled and it will likely be some time before the issue of a new appointment comes up again, I thought it might be useful to document some of the answers I gave people so that next time a new appointment is pending, at least my readers will understand better what is happening.

So for the record, this essay and the one to follow will document some of the statements I heard regarding NRC appointments over the past year or so and how I answered them. Exact language for the rules regarding Commission appointments can be found in the US Code at 42 USC 5841, which can be reviewed in its entirety at:

http://www.law.cornell.edu/uscode/html/uscode42/uscode_42_00005841----000-.html

1. When a new President is elected from a different party, the NRC Chairman has to step down.

Wrong! The NRC Chairman does serve—as Chairman—at “the pleasure of the President.” This means that any President can, at any time, ask whoever is chairman to step down as chairman. It

does not have to be a new President from a different party. It does not even have to be a new President. It would be unusual, but if a President loses confidence in the Chairman, the President can select another chairman at any time.

When a new President is elected, he—or she—has literally thousands of positions to fill. Believe it or not, the President usually has higher priorities than the NRC! I could fill the rest of this essay listing the major positions dealing with defense, budget, international relations and other matters that are more critical than the NRC. The President, of course, does have the authority to change the Chairman of the NRC as soon as he or she is sworn in. In practice, this never happens. The Chairman holding the office stays in the position until the President decides to appoint someone else as Chairman.

2. When a new Chairman is appointed, the old one has to leave the NRC.

Wrong! As we saw in this last transition, as long as the outgoing Chairman’s term has not expired, they may stay on as a Commissioner. The outgoing Chairman is permitted to leave immediately if he or she wishes to, of course, and many do. The outgoing Chairman usually believes that they have had their chance at influencing the course of the agency. In the case of Dale Klein, he decided to stay on to prevent the commission from becoming a two-member commission. (More on that below.)

3. The President can select anyone he/she wants to be Chairman.

Not always! If there is a vacancy on the Commission, then the President can nominate a commissioner with the understanding that person will be named as chairman as soon as he or she is confirmed by the Senate. Therefore, if there is a vacancy on the Commission, the President can select whomever he or she wants as Chairman.

Note that the President does not **have** to appoint someone new to serve as Chairman when there is a vacancy. In this last transition, there were vacancies on the Commission, but President Obama appointed one of the existing Commissioners, Gregory Jaczko, to replace Dale Klein.

However, if the Commission has five members when the new President comes in, the President can only select from among the existing members. The President cannot “fire” one of the sitting commissioners to create a vacancy. (A Commissioner may be removed from office by the President only for “inefficiency, neglect of duty, or malfeasance in office.”) What if the President doesn’t

want to choose any of the current commissioners? The President can wait until the next vacancy occurs and appoint a new commissioner with the intent to make him or her chairman immediately. Or the President can designate someone as Acting Chair, which gives a clear signal of the intent to make another appointment when that is possible.

One could argue, of course, that the President can ask one of the other commissioners to step down, and one would guess that, if that happens, the individual would most likely comply. However, the individual would not be required to step down. In practice, if a President wanted to remove a Commissioner, they would be likely to offer them some other desirable position. This has happened in other commissions, but it is an unusual practice. The bottom line is that the President can't fire a Commissioner except for misconduct.

4. The President's party has to have three of the Commission positions.

Wrong! In the first place, the President can't make any change in the makeup of the Commission until a vacancy develops. Since the President takes office on January 20 and Commission appointments start on July 1, if there is no vacancy on the Commission when a new President takes office, it is a minimum of five months until there is a vacancy for the President to fill. Even then, it might not be a vacancy that will allow the President to change the political composition of the Commission.

Let's look at a hypothetical case. Let's say that the Presidency has just changed from a Republican to a Democrat. In that case, it is likely that there are three Republican commissioners and two Democratic ones. (It is likely, but not necessary—see below.) If the next vacancy is for a position now held by a Republican, of course the President can appoint a Democrat and change the Commission makeup to three Democrats and two Republicans. But let's say the next vacancy that opens is one of the two Democratic seats. The President can, of course, appoint another Democrat, but that would still leave the Commission with a 3-2 Republican majority.

In addition, there is one more complication. The President does not actually have to appoint three members of his/her own party. The rule only requires that there be **"not more than three members of the Commission shall be members of the same political party."** Technically, this means that the President could appoint a member of the other party, or an Independent, or a member of a third party to one of the three positions. This, of course,

rarely, if ever, happens, and if it ever did happen, it would most likely be an Independent with strong leanings toward the President's party. I raise this point primarily to clarify what the rule actually says.

5. The President has to appoint two members of the opposite party to the Commission.

Wrong! If you read the last paragraph carefully, you will be able to guess why this statement is wrong. The rule only states that the President can appoint no more than three individuals from his/her own party. It is silent on who the others are. Obviously, the most frequent outcome is that the other two members are from the opposite party. However, as above, an Independent, or a member of a third party can conceptually be chosen. (In this case, unlike the statement above, the President could not appoint a member of his/her party to one of the two remaining positions if there were already three members of his/her party in the Commission.) During the Nixon Administration, there were cases of "Democrats for Nixon" being appointed to the minority positions on other Commissions. (The rules for commissions are similar, although not identical, for all U.S. government commissions.)

6. When a Commissioner's term ends, he or she can stay on until the President makes a new appointment.

Wrong! This is one of the areas in which the rules for NRC Commissioners do differ from the rules for other government commissions. My husband used to work for the Federal Communications Commission. For the most part, they followed the same rules as NRC follows. Or, I should say that NRC follows the same rules FCC follows because the FCC is a far older body. At the FCC, if a commissioner's term expires, the commissioner can, and usually does, stay on until the President nominates another commissioner and the nomination is confirmed by the Senate. In some cases, this has resulted in commissioners staying on for a year or more beyond the end of their terms. Sometimes, it was just considered easier to let that happen than to make a new appointment.

When the NRC was established, it was felt that putting in place language that would **forbid** an NRC commissioner from staying past the expiration of his or her appointment would prevent this kind of situation from developing. It has prevented that, but it has resulted in situations where the Commission operates with several members missing. (More on that below.)

In fact, there have been cases where the Presi-

dent has re-nominated an existing Commissioner, but where Senate action has not been completed before the expiration of the commissioner's term. In those cases, the commissioner involved has had to leave his position (so far, none of the female commissioners has been in this position) until the Senate has acted. For practical reasons, the NRC has usually used these commissioners-in-limbo in some consulting capacity while awaiting Senate action, but they have been excluded from taking part in any activities as a commissioner.

For reasons of length, I am going to stop this essay at this point. In my next essay, I will detail more misperceptions I have heard about the NRC Commissioner appointments.

As before, I will welcome comments on this and my future essays in this series. I'd also be interested to know if anyone has questions on the NRC—or the DOE, where I also worked—that I might be able to address in a future essay. My e-mail address is:

ghmarcus@alum.mit.edu.

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August 2010